STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DON VALLANCE,

Defendant-Appellant.

UNPUBLISHED
October 16, 2003

No. 242163
St. Joseph Circuit Court
LC No. 01-010550-FH

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of possession of methamphetamine, in violation of MCL 333.7403(2)(b); operating or maintaining a methamphetamine laboratory near specified places, in violation of MCL 333.7401c(2)(d); maintaining a drug house, in violation of MCL 333.7405(1)(d); and possession of a firearm during the commission of a felony, in violation of MCL 750.227b. We affirm defendant's convictions, but remand for resentencing on defendant's conviction of possession of methamphetamine.

Defendant first argues that he was denied his right to due process when the trial court proceeded with trial after he absconded. It is well settled that a defendant has a constitutional, statutory, and common law right to be present at his trial. US Const, Ams VI, XIV; Const 1963, art 1, §§ 17, 20; MCL 768.3; *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). See also *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). However, "[a] defendant's *voluntary* absence from the courtroom after trial has begun waives his right to be present and does not preclude the trial judge from proceeding with the trial to conclusion." *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975) (emphasis in original); *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). "A valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right." *Id.*

In the instant case, the record reveals that, contrary to defendant's assertion, defendant was specifically aware of his right to be present at trial and intentionally abandoned that right by failing to appear. The trial court provided an opportunity to locate defendant, and heard testimony concerning the efforts made to locate defendant and the consequent discovery of evidence of defendant's flight before determining that defendant voluntarily waived his right to be present at trial. In the instant case, the evidence established that, after the first day of trial,

defendant voluntarily absented himself from trial, thereby effectuating a valid waiver of his right to be present. *Swan, supra* at 452; *Woods, supra* at 479.[1]

Defendant next argues that there was insufficient evidence to sustain his convictions for operating or maintaining a methamphetamine laboratory near specified places, maintaining a drug house, and felony-firearm during the commission of a felony. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

MCL 333.7401c(1)(b) and (2)(d) provide in pertinent part:

> (1) A person shall not do any of the following:
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> (b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.
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> (2) A person who violates this section is guilty of a felony punishable as follows:
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> (d) If the violation occurs within 500 feet of a residence, business establishment, school property, or church or other house of worship, by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both.

MCL 333.7401c(7)(c) defines "manufacture" as "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis."

In the instant case, the following items were found in defendant's bedroom: a Pyrex flask, commonly used in the manufacture of methamphetamine; acetone, which can be used to extract ephedrine from pills or used as a cutting agent; black iodine crystals, one of the chemicals or

[1] Because the record reveals that defendant validly waived his right to be present, the issue of whether there was a reasonable probability that defendant was prejudiced by his absence need not be reached. *Gross, supra.*

components used to manufacture methamphetamine; five Pyrex pans; a clear glass pan with suspected iodine crystals; a one-gallon container of muriatic acid; five 12-ounce bottles of gas line antifreeze; a one-gallon container of clean strip acetone; one pound of iodine crystals; plastic tubing with a funnel; and one mason jar with layered pink fluid. Trooper James Coleman opined that the chemicals and laboratory equipment were components of a methamphetamine operation, and that the only missing ingredients were red phosphorus and an ephedrine source. Coleman testified that defendant's house was within 160 feet of one nearby residence, and within 209 feet from another nearby residence. Officer Natalie Thompson testified that defendant told her that he and Amanda Ready had attempted to "cook" methamphetamine two weeks earlier, but were unsuccessful because they did not have high quality red phosphorus, and that they were waiting for red phosphorus that they had ordered before attempting another "cook."

MCL 333.7401c(1)(b) provides that a person shall not "[o]wn or possess *any* chemical or *any* laboratory equipment that he or she *knows* or has reason to know is to be used for the purpose of manufacturing a controlled substance. . . ." (Emphasis added). Contrary to defendant's assertion, the statute does not require that every chemical component necessary to manufacture a controlled substance be present in order to sustain a conviction. Our Supreme Court has held that "we cannot contort the unambiguous words of a statute beyond their plain and ordinary meaning. The intent of the Legislature, as expressed by the words used in the statute, is controlling." *People v Love*, 425 Mich 691, 701; 391 NW2d 738 (1986) (Cavanagh, J.). The fact that red phosphorus and an ephedrine source were not present does not preclude sustaining defendant's conviction, where he admitted that he had used the chemicals and laboratory equipment in a previous attempt to manufacture methamphetamine and that he was planning another attempt once he obtained red phosphorus.

Defendant's argument that there was insufficient evidence to sustain his conviction because "there was no scientific determination that any of the substances that were alleged to be chemicals utilized in the manufacturing of methamphetamine, were what they were assumed to be" is also without merit. Our Supreme Court has held that "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Coleman's testimony that none of the labeled containers were tested to determine if they actually contained the substance indicated on the label does not preclude sustaining defendant's conviction, where the jury was free to infer that the containers actually contained the substance indicated on the label.

Defendant's contention that the "Pyrex dishes and a funnel and tube . . . do not constitute 'laboratory equipment'" is also without merit. MCL 333.7401c(7)(b) defines "laboratory equipment" as "any equipment, device, or container used or intended to be used in the process of manufacturing a controlled substance, counterfeit substance, or controlled substance analogue." Thompson testified that defendant told her that he and Ready had used the Pyrex pans in their attempt to cook methamphetamine two weeks earlier, and that the glass container with the pink fluid "was from the time that he and Ready had attempted to cook methamphetamine at his residence." The Pyrex pans, plastic tubing with a funnel, and mason jar layered with pink fluid, coupled with defendant's admission to Thompson, provided sufficient evidence from which a rational trier of fact could conclude that such items constituted "laboratory equipment" within the meaning of the statute.

Viewed in a light most favorable to the prosecution, there was more than sufficient evidence to support a finding beyond a reasonable doubt that defendant owned or possessed chemical and laboratory equipment that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine within five hundred feet of a residence, in violation of MCL 333.7401c(1)(b) and (2)(d).

Next, with regard to defendant's conviction for maintaining a drug house, MCL 333.7405(1)(d) provides:

> A person [s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

In the instant case, Detective Richard Hiscock testified that .23 grams of methamphetamine and 2.63 grams of marijuana were found in defendant's house. Officer Kyle Griffith conducted surveillance on defendant's house before the search warrant was executed. Defendant was present when the search warrant was executed. Thompson's conversation with defendant concerning the drug paraphernalia gave every indication that defendant resided at the house, and that the items were found in his bedroom. Thompson testified that defendant "admitted . . . that he uses marijuana, and that he will either give it to or sell it to his friends" that come over to his house. Additionally, Thompson testified that defendant told her that he and Ready were going to attempt to produce methamphetamine once they obtained red phosphorus, and that "it was going to be for Ready's and his personal use, and also for Ready to sell and make money to bond her husband out of jail."

When defendant failed to appear for trial, the police executed a search warrant at defendant's house, and discovered that many of the items that had been in the house in March 2001, were no longer there, including: the television, toiletries, towels, washcloths, blankets, pillows, clothing, and the metal safe that had been in defendant's closet. Nothing in the instant case would lead a rational trier of fact to conclude anything other than that the house in question was defendant's residence. Additionally, the jury was free to believe Thompson's testimony that defendant admitted that he uses marijuana, gives it to or sells it to his friends when they come over to his house, unsuccessfully tried to cook methamphetamine with Ready, and was going to attempt another "cook" once he and Ready received the necessary ingredients. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding beyond a reasonable doubt that defendant knowingly kept or maintained a dwelling frequented by persons using controlled substances for the purpose of using controlled substances, or that is used for keeping or selling controlled substances, in violation of MCL 333.7405(1)(d).

Regarding defendant's contention that there was insufficient evidence to sustain his felony-firearm conviction, MCL 750.227b provides, in pertinent part:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony. . . is guilty of a felony.

In the instant case, Hiscock testified that he found a shotgun propped up against the safe in defendant's closet, and that the safe contained methamphetamine, marijuana, and scales commonly used to weigh narcotics. Thompson testified that defendant acknowledged that he owned the shotgun.

Our Supreme Court has held that in a case where the underlying felony is possession of a controlled substance, the relevant inquiry "is whether the defendant possessed a firearm *at the time he committed a felony*." *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000) (emphasis in original). Our Supreme Court noted that "[a] drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information." *Id*. at 439 (footnote omitted).

In the instant case, the police found drugs inside a safe in defendant's bedroom closet and found the shotgun propped up against the safe. Additionally, defendant was at his house when the police executed the search warrant. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding beyond a reasonable doubt that defendant had a firearm in his possession when he committed or attempted to commit the felony of possession of methamphetamine and marijuana.

Defendant next argues that he was denied his right to a fair trial when the prosecutor improperly vouched for the truthfulness of Thompson. It is well settled that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is not improper for a prosecutor to comment on a witness' credibility during closing arguments or to suggest to the jury that a witness is telling the truth. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). In the instant case, the prosecutor never argued to the jury that he had some special knowledge unknown to the jury concerning Thompson's truthfulness; rather, he argued that, based on Thompson's demeanor at trial, and specific instances where she easily could have lied but did not, she was truthfully recounting defendant's admissions. "Placed in context, the prosecutor's remarks did not urge the jury to improperly 'suspend its own powers of critical analysis and judgment in deference to those of the police and prosecutor.'" *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Defendant also argues that he is entitled to be resentenced because the sentencing investigation report was erroneously scored for possession of methamphetamine with intent to deliver (which defendant was charged with), as opposed to simple possession of methamphetamine (which defendant was convicted of). We agree. Defendant is entitled to resentencing for his conviction of possession of methamphetamine, because there was a plain error in scoring the sentencing guidelines range, which affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).[2]

[2] Because the instant offense occurred after January 1, 1999, the legislative sentencing guidelines apply, MCL 777.1 *et seq*. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

In the instant case, defendant was originally charged with the manufacture of and/or possession with intent to deliver methamphetamine, in violation of MCL 333.7401(2)(b)(i). However, based on the fact that the amount of methamphetamine recovered from defendant's house weighed .23 grams and Hiscock's testimony that such a small amount was likely for personal use, the prosecution moved to amend the charge to simple possession of methamphetamine, in violation of MCL 333.7403(2)(b)(i). The trial court instructed the jury on the elements of possession of methamphetamine, and the jury found defendant guilty of possession of methamphetamine.

However, the sentencing information report, upon which the trial court apparently relied when sentencing defendant, did not accurately reflect the amended charge and subsequent conviction for simple possession. Consequently, the trial court improperly sentenced defendant for manufacturing and/or possession with intent to manufacture methamphetamine, MCL 333.7401(2)(b)(i), instead of simple possession of methamphetamine, MCL 333.7403(2)(b)(i).

Our Supreme Court has held that "a sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). The trial court's reliance on inaccurate information in determining defendant's sentence amounted to plain error affecting defendant's substantial rights. *Carines, supra.* Defendant's sentence on this count is invalid, and he is entitled to be resentenced for the crime of which he was actually convicted, simple possession of methamphetamine. MCL 769.34(10).

Defendant next contends that the trial court improperly scored ten points for OV 19 on count I. Defendant's argument is without merit. OV 19 is defined as "threat to the security of a penal institution or court or interference with the administration of justice." MCL 777.49. MCL 777.49(c) provides that a score of ten points is appropriate where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." This Court recently discussed the meaning of "interference with justice" in the context of OV 19:

> "Interference with" justice is equivalent in meaning to "obstruction of" justice. Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 611. Obstruction of justice "is a broad phrase that captures every willful act of corruption, intimidation, or force *that tends somehow to impair the machinery of the civil or criminal law*." *Id.* (emphasis added). Interference with the administration of justice thus involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved. See, e.g., *People v Coleman*, 350 Mich 268; 86 NW2d 281 (1957) (affirming a conviction of obstruction of justice involving witness tampering). [*People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002).]

In the instant case, defendant absconded and did not appear for trial on August 2, 2001. Defendant was eventually arrested in Columbia, Tennessee on March 14, 2002. Defendant's mid-trial flight constituted "an effort to undermine or prohibit the judicial process," and was precisely the type of "evasive and noncooperative behavior" that OV 19 was designed to address. *Deline, supra* at 697-698. This Court has held that "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Additionally, "[s]coring decisions for which there is any evidence in support will be upheld." *Id.*

(Citation omitted.) Because defendant absconded during trial and interfered with the administration of justice, the trial court's score of ten points for OV 19 was not erroneous.[3]

Defendant's final argument is that he is entitled to be resentenced before a different judge. In *Cain v Dep't of Corrections*, 451 Mich 470; 548 NW2d 210 (1996), the Michigan Supreme Court set forth the general standards necessary for the disqualification of judges. In order for a judge to be disqualified from a case, a defendant must demonstrate actual bias or prejudice that is both personal and extrajudicial. *Id*. at 495. Additionally, the party challenging a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. *Id*. at 497.

Further, with respect to the specific issue of whether resentencing should occur before a different judge, "this Court applies the following test:

> "'(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.'" [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777, 780 (CA 9, 1986).] [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).][4]

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[3] Defendant's ineffective assistance of counsel argument does not afford him any additional relief. As noted above, the trial court properly scored ten points for OV 19, where defendant's mid-trial flight constituted "interference with the administration of justice." It is well settled that trial counsel is not ineffective for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Therefore, counsel was not ineffective for failing to object to the scoring of OV 19. Additionally, had defense counsel objected to the sentencing information report, he would have been successful. However, "[t]he remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered." *Whitfield*, *supra* at 354. Since, on remand, the trial court must resentence defendant for the crime of which he was actually convicted, possession of methamphetamine in violation of MCL 333.7403(2)(b)(i), defendant is entitled to no further relief.

[4] We note that *Hill*, *supra*, represents a more lenient and flexible test than the one set forth in *Cain*, *supra*, and *Cain's* test would presumably control all questions regarding disqualifications. However, our Supreme Court has cited with approval the standard first articulated in *Evans* and thereafter in *Hill*. See *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001), citing *Evans*, *supra* at 71-72, and following cases such as *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998), which relied in part on *Hill*, *supra*.

In the instant case, the trial court's errors involved reliance on improperly scored sentencing guidelines set out in the sentencing information report. There is no indication that the trial court would have substantial difficulty in sentencing defendant for the crime of which he was actually convicted. *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001). The original sentence was a result of a mistake in the sentencing information report and the trial court's reliance on the same, which likely occurred because of the lapse between the time defendant was convicted (August 3, 2001), and the time defendant was apprehended and sentenced (May 24, 2002). A mistake of fact does not constitute evidence of an actual prejudice or bias on behalf of the trial judge that is both personal and extrajudicial. *Cain*, *supra* at 495. Therefore, resentencing before a different judge is not required.

Defendant's convictions are affirmed, but the case is remanded for resentencing on defendant's conviction for possession of methamphetamine. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray